STATE REPRESENTATIVE
CORY MASON

WISCONSIN STATE ASSEMBLY
62ND ASSEMBLY DISTRICT

TO: Assembly Committee on State Affairs & Homeland Security

FROM: Representative Cory Mason

RE: Assembly Bill 36; Senate Bill 19

DATE: March 24, 2009

Thank you Chairman Kessler and committee members for holding a hearing on Assembly Bill 36. The Senate companion of this bill is Senate Bill 19. AB 36 and SB 19 restore the federal civil rights of 62,000 state and UW employees.

Due to several recent U.S. Supreme Court decisions, state and University of Wisconsin employees are not protected under several federal civil rights laws, including:

- **Age Discrimination Employment Act**
- **Family Leave Medical Leave Act**
- **Americans with Disabilities Act**
- **Fair Labor Standards Act**

The Court ruled that the Eleventh Amendment, which ensures that states are immune from lawsuits, supersedes the equal protection rights guaranteed to every citizen under the Fourteenth Amendment. The court also held, however, that if a state wants to waive its immunity in these matters, it can do so. This bill seeks to do just that.

Without the ability to access federal courts for protection under these fundamental civil rights, university and state employees are relegated to citizens with second class status. This bill very simply restores existing federal civil rights to <u>every</u> Wisconsin citizen.

I would be happy to entertain any questions you might have.

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AARP℠

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Testimony for the Assembly Committee on State Affairs and Homeland Security
Public Hearing on AB 36 – Civil Rights Restoration Bill
Presented by AARP Volunteer Advocate John Greene

March 24, 2009

Good morning. My name is John Greene and I am speaking on behalf of A-A-R-P Wisconsin. We are a membership organization for people age 50-plus and we have about 847,000 members here in Wisconsin alone. I appreciate the opportunity to speak today about an issue that is so important to our many state employees, both old and young.

AARP Wisconsin would like to thank Representative Mason and Senator Taylor for introducing this legislation again this session. We are pleased to support Assembly Bill 36 which would restore the civil rights of state employees by allowing them to sue the state for age or disability discrimination, as well as for violations of the Fair Labor Standards Act.

All citizens of the United States are to be afforded equal protection and equal rights under our Constitution. We do not believe our Founders meant to put an asterisk after "state government employees" affording equality to everyone but them.

This proposed legislation is about right and wrong. It is about equal justice. AARP has long opposed discrimination in all its forms, and has been particularly involved in ensuring full implementation of the Age Discrimination in Employment Act.

At AARP our advocacy is not only about justice. It is about doing what is best for society. Older employees are among the most valuable members of our work force. I know I have benefited from the wisdom and unique insights of older government employees, and I'm sure many of you have as well.

State employees should not be relegated to second-class citizenship with respect to age and disability bias claims. If this legislation is not enacted, state employees will continue to be deprived of legal rights equivalent to those afforded to private sector workers.

AARP Wisconsin urges the Committee to vote in favor of this bill and restore the civil rights of Wisconsin's valuable state employees.

Thank you.

For more information, contact Lisa Lamkins, AARP Wisconsin Advocacy Director at 608-286-6302 or llamkins@aarp.org

disabilityrights | WISCONSIN

To: Representative Kessler, Chair, and committee members of the Assembly Committee on State Affairs and Homeland Security

From: Alicia Boehme on behalf of Disability Rights Wisconsin (DRW)

Date: March 24, 2009

RE: AB 36

DRW strongly supports AB 36. Although we also support the provisions related to the FLSA, ADEA and FMLA, we want to highlight our support of the provision which makes it clear that Wisconsin State government, as an employer, is responsible and liable for violations of Title I of the Americans with Disabilities Act (ADA).

DRW is the protection and advocacy agency for people with disabilities in Wisconsin. In 2008, our agency provided legal advocacy to over 6,400 people with disabilities and trained to almost 5,700 people on the legal rights of people with disabilities. One of the areas of focus for our agency is providing legal advocacy for employees and prospective employees with disabilities who have experienced employment discrimination. We provide systems advocacy as well as individual and class-action representation. I am an advocacy specialist on DRW's Civil Rights team, which includes an attorney. The majority of our team's individual advocacy is in the area of employment discrimination. As part of our work, DRW advises and represents state employees with disabilities who have experienced discrimination. We must explain to state employees that they have no protection under the ADA to prevent discrimination against them, nor can they ask for reasonable accommodations that would permit them to do their jobs.

In a series of holdings, U.S. Supreme Court narrowly restricted the definition of disability under the ADA so that few could meet the standard and thus claim protection from discrimination under the law. *University of Alabama v. Garrett* delivered another blow: employees of state government could no longer bring claims of discrimination under the ADA because of sovereign immunity. The Americans with Disabilities Amendments Act, which went into effect January 1, 2009, clarifies Congress' intent that the ADA definition of disability be interpreted broadly. However, legislation such as AB 36 is needed in order to make it clear that Wisconsin does not allow discrimination against State employees with disabilities.

We believe the ADA provisions of this bill are vital because they acknowledge the rights of Wisconsin employees to be free from discrimination, regardless of employer. Related to the ADA, this bill ensures that the state government is

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liable for acts of discrimination against individuals with disabilities in the same way as any employer, any business or any other arm of government. If enacted, it will place the same duties of non-discrimination and reasonable accommodation on the state as every other employer. It will provide people with disabilities the same legal protections and remedies in dealing with the state as exists with every other level of government or private business.

Individual Rights & Responsibilities Section

State Bar of Wisconsin

Wisconsin Lawyers. Expert Advisers. Serving You.

March 24, 2009

TO: Members of the Assembly Committee on State Affairs and Homeland Security

FROM: A. Steven Porter, Legislative Chair
Individual Rights and Responsibilities Section
State Bar of Wisconsin

RE: Support for Assembly Bill 36

On behalf of the Individual Rights and Responsibilities Section of the State Bar of Wisconsin, I want to communicate our section's strong support for Assembly Bill 36 and its Senate companion bill, SB 19.

The U.S. Supreme Court has been slowly undermining the ability of citizens, and especially state employees, to enforce federal civil rights laws and protective labor laws. One way they have done this is to overrule long-standing precedent to hold that Congress did not have the power to abrogate state sovereign immunity to hold the states accountable under those laws. As a result, citizens and state employees can no longer enforce these laws against their state's agencies and their state employers unless the state has consented to suit, or waived its sovereign immunity, to allow citizen and employee enforcement of those laws. The civil rights and protective labor laws affected include, among others: the Fair Labor Standards Act (FLSA), the Age Discrimination in Employment Act (ADEA) , the Americans with Disabilities Act (ADA) and, in some respects, the Family and Medical Leave Act (FMLA). In some cases, the Supreme Court has overruled precedent that was over forty years old, as with the Fair Labor

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Standards Act (FLSA), and nearly thirty years old, as with regard to the Age Discrimination in Employment Act (ADEA), to achieve this result. In essence, the Supreme Court is saying that it's up to the states to step up and permit enforcement of civil rights and protective labor laws against them; Congress, alone, can no longer hold them accountable.

Because sovereign immunity only applies to the state and state agencies, employees of other governmental units such as municipalities and school boards and citizens are not blocked from suing these entities under the Supreme Court's decisions.

In February, 2001, when United States Supreme Court's decision in *University of Alabama v. Garrett* came down, I had just won an appeal in the United States Court of Appeals for the Seventh Circuit in a case against the State of Wisconsin Department of Transportation under the Americans with Disabilities Act. My client and I were very pleased to be able to proceed to trial with her claim after a long battle to vindicate her claim. But, when the Supreme Court's decision in *Garrett* came down, my client lost her claim for relief against the State DOT under the ADA.

My client had been employed by the State of Wisconsin DOT for twenty-two years as a low level clerk. Despite her severe dyslexia, dysgraphia and other learning and communications disabilities, her performance reviews had always reported that her performance was satisfactory, even exemplary. That is, until the DOT computerized the operations in my client's unit, and my client was required to become adept at using a new computer operating system and new programs. The DOT brought in a trainer to train the employees on the new system, but, the trainer had no training or experience regarding training people with learning disabilities. My client requested that the DOT provide her with a tutor, which she could have received free from the Division of Vocational Rehabilitation, but her supervisors denied her request. As a result, my client was not able to learn the new system, and, therefore, she did not receive the promotions that the others in her unit who did not have learning disabilities received upon mastering the new computer system. Instead, my client was shunted off to another unit and a dead-end job with no increase in pay. What's more, she suffered humiliation, excessive distress and loss of

her sense of confidence, self-worth and enjoyment of her job as result of her experiences in the training program.

I brought a claim under the Americans with Disabilities Act on behalf of my client to compel the Department of Transportation to provide my client with the trainer and training she needed in order to be able to learn the new computer system and advance in her job. Those hopes were nearly dashed when the United States Supreme Court ruled that, because of its new interpretation of state sovereign immunity, my client was no longer permitted to sue the State of Wisconsin under the Americans with Disabilities Act.

I urge this committee to promptly recommend Assembly Bill 36 for passage.

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
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March 24, 2009

TO: The Honorable Members of the Assembly Committee on State Affairs and Homeland Security

FR: Mark Rinehart, Legislative Liaison

RE: 2009 Assembly Bill 36

Dear Representatives:

Last month, the Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing held a public hearing on Senate Bill 19, the Senate companion bill to Assembly Bill 36, relating to the liability of the state for certain violations.

Please find attached the Attorney General's letter to the Senate Judiciary Committee opposing SB 19.

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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February 11, 2009

TO: The Honorable Members of the Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing

FR: Attorney General J.B. Van Hollen

RE: 2009 Senate Bill 19

Dear Senators:

I write today to oppose the enactment of 2009 Senate Bill 19.

As Attorney General, my office would be responsible for representing the state in all of the federal and state court actions that would arise from waiving sovereign immunity with respect to Title I of the Americans with Disability Act, the Age Discrimination in Employment Act, the Fair Labor Standards Act, and the Family and Medical Leave Act. I am very concerned that this legislation is an overbroad and expensive solution to a problem that does not exist.

Each of the federal laws addressed by this bill has an analog in the Wisconsin statutes with nearly identical substantive provisions that protects state employees. While state and federal law provide different processes to vindicate those underlying protections and sometimes provide different remedies, the process that Wisconsin provides to protect rights guaranteed by state law—administrative enforcement options—is less costly to the state and possibly state employees than cumbersome and expensive court actions.

Thus, this bill will expose the state to increased costs yet does not provide any money or resources to offset those costs. Even with funding, I do not believe it is prudent—particularly in light of the current fiscal situation—to increase costs without tangibly increasing substantive protections or benefits.

I am also opposed to this bill because its breadth is unnecessary and undermines Wisconsin's sovereignty. Whatever differences exist between the federal and Wisconsin legal schemes, it is entirely within the control of the Wisconsin Legislature to address those changes without a blanket waiver of sovereign immunity. If, for example, the legislature believes that current employment law provides an insufficient remedy to state workers, nothing prevents the legislature from addressing that particular problem through targeted amendments to current law. Surrendering state sovereign immunity, however, is just another way of saying that Wisconsin needs the Congress of the United States to dictate our state's policies with regard to the protection of the state workforce.

Last, this approach is without precedent. Since statehood, the Wisconsin legislature has never unilaterally waived Wisconsin's immunity against federal law claims as the bill draft proposes to do.[1] Of course, the legislature *has* carved out situations in which the state could be sued under Wisconsin law—indeed, it has done so with regard to employee rights. I believe that our state can adequately protect the rights of the state workforce, and that it is our state legislature, not Congress, that is the proper entity to provide these protections.

Respectfully, I ask that you oppose this bill.

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[1] Wisconsin immunity has been eliminated regarding certain federal law claims by other means, primarily: (1) Congress involuntarily abrogated Wisconsin's immunity against claims arising under various laws that were promulgated pursuant to Congress' 14th Amendment Authority; and (2) certain Wisconsin agencies have agreed to suit regarding federal law claims in exchange for the receipt of federal funding, such as claims arising under title IX. That Congress has not involuntarily abrogated Wisconsin's immunity with respect to these laws is an indication that Congress does not perceive these laws as the protection of fundamental civil rights of the nature protected by the 14th Amendment.